

DIEGO (Migration) [2018] AATA 1396 (6 April 2018)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Cherielyn Diego

CASE NUMBER: 1621089

DIBP REFERENCE(S): BCC2015/2636230

MEMBER: Moira Brophy

DATE: 6 April 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 (Spouse) visa:

- Public Interest Criterion 4020 for the purposes of cl.820.226 of Schedule 2 to the Regulations.
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06 April 2018 at 2:33pm

Statement made on

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – False and misleading information – Relationship category – Emotional support and companionship – Genuine and continuing relationship

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2 cl 820.226, Schedule 4 PIC4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 23 November 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 9 September 2015. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.820.226 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the applicant had provided information in a previous application that was inconsistent with information provided in this application and accordingly the delegate found she was not able to satisfy Public Interest Criterion (PIC) 4020.
6. The applicant appeared before the Tribunal on 17 January 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Mr Lindsay Deveril. The Tribunal hearing was conducted with the assistance of an interpreter in the Tagalog and English languages.
7. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.820.226 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver

does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. The delegate found the applicant gave information that was misleading in a material particular. The information relied on in making that finding was that in the present application she had not listed a previous relationship she had with Mr Robin Keith Wilson. In applications for a visitor visa lodged on 20 March 2013 and 8 January 2014 the applicant had indicated she was travelling to Australia to visit her then fiancé Mr Robin Keith Wilson.
15. The applicant told the Tribunal she met Mr Wilson in June 2011 when he travelled to the Philippines to meet her having previously chatted online. While he was in the Philippines for 15 days she discovered he was already married. His marriage was not stable and after he returned to Australia it broke up. He returned to the Philippines in September 2011 and while there he asked the applicant to come to Australia. At that time the applicant did not have a passport and she applied for one and got her first passport in November 2011. Mr Wilson returned to the Philippines in February/March 2012 and the applicant completed the paperwork for a three month visa to visit Australia. Her application was successful and she came to Australia for two months and then returned to the Philippines. While in Australia she learned Mr Wilson had in fact been married four times previously. Mr Wilson visited her in the Philippines in December 2012 and in January 2013 she applied to come to Australia on a one year tourist visa. She arrived in Darwin in February 2013 and was living with Mr Wilson. He decided he wanted to move to Adelaide soon after and they moved there in May 2013. Two days after moving to Adelaide the applicant learned Mr Wilson was transferring sums of money to another woman in the Philippines. She returned to Darwin and was having some difficulty processing the information. Mr Wilson continued to pursue her and despite having returned to the Philippines he persuaded her to come back to Australia to try and make the relationship work. When she arrived back in the July he informed he was financially broke and was not able to support her. She determined to not have anything further to do with Mr Wilson. She was staying with friends who provided free accommodation in exchange for her babysitting their children.

16. The applicant gave the above history of the relationship in a spontaneous and credible manner. The Tribunal was satisfied her account of the relationship was factual.
17. The Tribunal then considered whether the omission of the information as to the previous relationship was 'information that is false or misleading in a material particular' as defined in PIC 4020(5). There is no doubt there was for a time a relationship between the applicant and Mr Wilson. The Partner application form requests information as to whether a person has been 'engaged' or in a 'defacto' relationship previously. The reality is that a person may have several relationships in their lifetime and that there may be certain fluidity in many of those relationships. Defining what category a relationship falls into can be challenging and sometimes, as in this case, prescriptive terms such as 'defacto' or 'engaged' are not adequate in that they do not describe the actuality of the relationship.
18. The question of what constitutes false or misleading information involves several considerations. Most importantly, PIC 4020 is directed at information which is false, in the sense of purposely untrue, rather than information which lacks the necessary element of fraud or deception (e.g. in the case of an innocent or unintended mistake). The Tribunal is satisfied the omission here was not intended to deceive in any way. As described by the applicant and accepted by the Tribunal, the relationship between the applicant and Mr Wilson was a relationship that fell outside the prescriptive information required by the form.
19. The Tribunal is satisfied the omission of the relationship from the present Partner application was not information that is false and misleading in a material particular
20. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

21. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
22. There was no evidence the applicant or any member of the family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1)
23. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

24. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The Tribunal was satisfied from documents provided at the time of hearing as to the identity of the applicant.
25. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

26. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).

27. There was no evidence before the Tribunal the applicant or any member of the family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(2A);
28. Therefore PIC 4020(2B) is met.
29. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.820.226.

30. **Conclusion**

31. The Tribunal has had the advantage of being able to observe the parties together at the hearing. Their emotional support for each other and companionship was readily apparent. They presented as a couple who loved and respected each other and who were devoted to their daughter.
32. The parties demonstrated a detailed knowledge of each other's lives and daily routines. Their evidence about their future plans was consistent. The Tribunal was satisfied that the applicant and her partner were committed to being in a long-term relationship. The degree of companionship and emotional support the parties clearly draw from one another provides significant weight in support of the finding that the parties are in a genuine and continuous relationship.
33. The Tribunal finds that the visa applicant and his sponsor have been in a committed relationship since they began they met in September 2013. They have lived together continuously since December 2013. They both acknowledged the relationship had progressed rapidly after they met but both spoke of their loneliness prior to meeting and of their instant attraction.
34. The decision to have a family together indicates a significant commitment to the relationship by both the applicant and her sponsor. The applicant gave evidence at the hearing of their excitement when their daughter was born.
35. Given these findings the Tribunal is satisfied that at the time of application and at the time of this decision the parties are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is satisfied the parties live together and therefore do not live separately and apart on a permanent basis.

DECISION

36. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 (Spouse) visa:
 - Public Interest Criterion 4020 for the purposes of cl.820.226 of Schedule 2 to the Regulations.

Moirá Brophy
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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